Supreme Court, U.S.
FILED
DEC 8 1992
OFFICE OF THE CLERK

(2)

No. 92-799

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE ENVIRONMENTAL COUNCIL OF SACRAMENTO AND SIERRA CLUB

JOSEPH J. BRECHER
1970 Broadway, 12th Floor
Oakland, CA 94612
(510) 272-0433
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, even though the Environmental Protection Agency has entered into a binding stipulation to promulgate a Federal Implementation Plan for the Sacramento area, and despite the fact that the statutory language that compels the adoption of such a plan was not changed by the 1990 Clean Air Act amendments, EPA should be relieved of its obligation to provide relief for the breathing public of the area on the basis of dubious policy arguments.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Braxton v. U.S., 114 L.Ed.2d 385 6

Citizens for a Better Environment v. Costle, 515 F. Supp. 264 (N.D. Ill. 1981) 8

George v. Morgan Constr. Co., 389 F.Supp. 253 (E.D.Pa. 1975) 7

Havenfield v. H&R Block, Inc., 509 F.2d 1263 (8th Cir. 1975) 7

Logsdon v. Baker, 366 F.Supp. 332 (D.C. Cir. 1973) 7

New England Law Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979) 8

Train v. NRDC, 421 U.S. 60 (1975) 8

STATUTES

47 Fed. Reg. 50,864 6

48 Fed. Reg. 5074 2

49 Fed. Reg. 30,300 ..... 3, 6

51 Fed. Reg. 34428, 34431 3

55 Fed. Reg. 12669 7

No. 92-799

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE ENVIRONMENTAL COUNCIL OF SACRAMENTO AND SIERRA CLUB

The Environmental Council of Sacramento and Sierra Club[1] oppose the Environmental Protection Agency's Petition for Writ of Certiorari and urge that it be denied.

[1] Respondents Environmental Council of Sacramento and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Supreme Court Rule 29.1.

The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans for the Sacramento and Los Angeles air basins. This holding applies to only three areas in California and will have no further applicability under federal law.

STATEMENT OF THE CASE

This case presents an extreme example of a government agency doing everything it can to avoid performing its duty under the law. The result has been over a decade of unhealthy air for the citizens of the Sacramento area. In 1979, the State of California submitted an air quality plan for the Sacramento area in which it requested EPA to approve an extension of the statutory deadline for achieving the ozone standard to December 31, 1987. In August, 1982, the State submitted an updated plan which acknowledged that even if all measures contained therein were implemented, the ozone air quality standard would not be achieved by 1987.

On February 3, 1983, EPA proposed to disapprove the 1982 plan, primarily because it failed to demonstrate attainment of the ozone standard by any date. See 48 Fed. Reg. 5074. On July 3, 1984, EPA took "final" action on the 1982 SIP. It approved the control strategy in the SIP for the Sacramento area because the measures included in that strategy would strengthen the 1979 SIP. However, EPA announced that it would take no action on the attainment demonstration and the provisions to sustain reasonable further progress toward reducing emissions (RFP) contained in the amended SIP, because of its previous

finding that the ozone standard would not be attained. See 49 Fed. Reg. 30,300. Rather than disapprove the portions of the Sacramento area plan dealing with attainment demonstration and RFP, as originally proposed, EPA stated it would perform an in-depth evaluation to determine what additional measures would be necessary to achieve the NAAQS and would examine whether the Sacramento authorities were continuing to make all reasonable efforts to submit an approvable SIP.

At that point, EPA instituted its so-called "Reasonable Extra Efforts Program," (REEP) which emphasized the implementation of all reasonably available additional control measures, but did not set forth any specific attainment date. The agency later explained that it would implement the REEP program by requiring Sacramento and the other non-attainment areas in California to submit a new SIP revision by February 1987. As part of that revision, the Sacramento authorities would be required to set forth an "expeditious schedule" under which they would consider additional measures for adoption which may be necessary to demonstrate reasonable efforts under Part D of the Clean Air Act; to decide which of those additional measures to adopt; to justify the rejection of other measures; and to implement those measures which are adopted. See 51 Fed. Reg. 34428, 34431, col. 3, September 26, 1986. Despite this strong language by EPA, state and local authorities never submitted a revised SIP.

After lengthy, unsuccessful negotiations, the Environmental Council of Sacramento and the Sierra Club filed Action No. S-87-420 EJG in the Eastern District of California on March 17, 1987, seeking to require EPA to adopt a FIP for Sacramento. Negotiations resumed and on

April 17, 1989, the parties reached a settlement whereby EPA agreed to adopt a FIP in two stages – a Notice of Proposed Rulemaking by June 26, 1991, followed by a final Rulemaking on February 22, 1992. Thus, under the original stipulated timetable, EPA's FIP would be promulgated almost ten years after its duty to do so arose. It was approved by the court on June 22, 1989. Pursuant to the settlement, EPA formally disapproved the Sacramento SIP for ozone on December 1, 1988. 53 Fed. Reg. 48537.

Then began a series of delays which continues to this day. First, the agency asserted it had inadequate air pollution modelling data and needed an extra year to complete its task. Plaintiffs reluctantly agreed to this request, and an order thereon was entered on May 16, 1991. On May 6, 1991, EPA moved to vacate the settlement and dismiss the case on the ground that the 1990 Clean Air Act Amendments had relieved it of the obligation to promulgate a FIP. The motion was argued on November 15, 1991 and Judge Garcia issued a decision denying the motion on December 2, 1991. At the same time, the agency moved to vacate the similar Los Angeles FIP settlement in the Central District of California, in the *Coalition for Clean Air* case, described in the petition for writ of certiorari. The two District Courts issued split decisions on the issue, with the court ruling in favor of the e. vironmentalist position in the Sacramento case and the Central District deciding in favor of the government in the Los Angeles case.

Each decision was appealed to the Ninth Circuit. That court ruled in favor of the environmentalists in the *Coalition* case on July 1, 1992, issuing a lengthy opinion. One week later, on July 9, the same Ninth Circuit panel

issued a two-sentence opinion affirming the trial court's decision in the present case, citing the opinion in the Los Angeles case. Mandate issued in the current action on July 31, 1992. Subsequently, at the request of Respondents, the trial court issued orders on November 16 and 20, 1992, ordering EPA to propose a FIP by December 31, 1992 and to issue a final FIP six months after this Court disposes of the current petition in favor of Respondents. Thus, under the current schedule, Sacramento will finally have a FIP eleven years after it was originally due.

REASONS FOR DENYING THE PETITION

As the Solicitor General has noted, this case raises legal issues identical to those presented in the petition for certiorari in *U.S.E.P.A. v. Coalition for Clean Air*, which was filed at the same time as the current petition and, thus, should be disposed of in the same way as that case. Respondents in the *Coalition* case have fully discussed the lack of merit of the Government's position; there is no need for Respondents here to repeat those arguments. We do wish to emphasize certain key points, however.

A. None of usual reasons for granting certiorari are present in this case. Rule 10 of this Court's rules emphasizes that certiorari will be granted "only when there are special and important reasons therefor." That Rule sets forth three typical reasons for granting the writ: conflict between the circuits, conflict between state courts on federal issues, or the desirability of settling an important point of federal law on which this Court has not spoken. Avoidance of conflicts is the principal reason for

this court to accept jurisdiction. *Braxton v. U.S.*, 114 L.Ed.2d 385, 391.

None of those eventualities are present here. Every court that has addressed the issue in this case (except the trial court in the *Coalition* case) has decided in favor of the Respondents' position. Furthermore, this is **not** an instance in which the Court needs to settle an issue which will be of widespread and continual importance. As the Government concedes, " . . . [T]he particular legal question presented in this case is of limited legal scope and of a non-recurring nature." Petition in the *Coalition* case, p. 26.

B. The prospects of economic doom advanced by the Government are not credible. Since the normal considerations governing the granting of certiorari are admittedly not present here, the Government makes two policy arguments to support its position. Neither are well-founded. First, it claims that implementation of a FIP will result in economic collapse in the three areas of California that would be affected. This "sky-is-falling" argument is belied by the facts.

None of the other areas where FIPs have been adopted have experienced any noticeable dislocations because of the implementation of FIPs. The Government attempts to explain away the lack of intrusiveness of the two Arizona FIPs by noting that Phoenix and Tucson had already adopted most of the necessary control measures by the time the FIP was issued. But the same is true in Los Angeles and Sacramento – EPA has already approved a wide range of control measures for those areas. 47 Fed. Reg. 50,864, 49 Fed. Reg. 30,300. Thus, EPA will not be

"reinventing the wheel" when it adopts FIPs for those areas. Furthermore, the agency adopted a FIP for Chicago and, at last report, that city's economy has not been plunged into chaos.

The Government's predictions of dire economic consequences are based upon the declaration of David P. Howekamp, Director of the Air and Toxics Division for EPA Region IX. Petition in the *Coalition* case, p. 22. Mr. Howekamp's knowledge of economics is problematical, at best. The exaggerated hyperbole of his declaration shows the wisdom of the rule against accepting "expert" opinions from one who is totally unqualified in a given field. "An expert witness must show special knowledge of the very question upon which he is to express an opinion." *George v. Morgan Constr. Co.*, 389 F.Supp. 253, 259 (E.D.Pa. 1975). See also *Havenfield v. H&R Block, Inc.*, 509 F.2d 1263, 1273 (8th Cir. 1975); *Logsdon v. Baker*, 366 F.Supp. 332, 336 (D.C. Cir. 1973).

EPA's predictions of the need to include draconian measures that will bring the Sacramento region to its knees are not borne out by the facts. The agency has issued an Advanced Notice of Proposed Rulemaking which lists all the control measures which will likely have to be included in a Sacramento FIP. See 55 Fed. Reg. 12669, March 1, 1990. The list is included in Appendix A. As can readily be seen, the list proposes **no** harsh measures such as gas rationing. Thus, contrary to the Government's assertion (Petition, p. 8), disruption to the Sacramento area economy by a FIP will be minimal.

C. **Adoption of a FIP will not interfere with state air quality planning efforts.** The Government emphasizes that the 1990 Clean Air Act amendments emphasize state primacy in the effort to achieve the ambient air quality standards. This is true, but it is nothing new. Beginning with *Train v. NRDC*, 421 U.S. 60, 79 (1975), this court has acknowledged the State's "historically . . . primary role." Yet, during all that time, no court has ever held that EPA's FIP obligation under Section 110(c) conflicted with State primacy. To the contrary, several opinions emphasized the important role of FIPs as a potent way of motivating the states to comply with the law. See, *e.g., Citizens for a Better Environment v. Costle*, 515 F. Supp. 264, 272, 277 (N.D. Ill. 1981); *New England Law Foundation v. Costle*, 475 F. Supp. 425, 432 (D. Conn. 1979), *modified on other grounds*, 632 F.2d 936 (2d Cir. 1980).

The original Stipulation and Order of Settlement adopted by the trial court in this case (included in Appendix B) show how the SIP and FIP processes would work in tandem. In that document, the parties acknowledge that the State has the primary responsibility for developing an acceptable Plan; the FIP measures adopted by EPA would merely supplement the existing SIP provisions, which remain in force. See Appendix B, ¶ 6. Furthermore, the Stipulation obligates EPA to act quickly on any SIP revisions submitted by the State – within 7 months. See ¶ 8(c).

EPA's Status Report filed June 26, 1990 in this case (reproduced in Appendix C) illustrates the close partnership between EPA and local authorities in the planning process. That document shows that EPA and local Sacramento authorities have been working together on the air

planning process for that area. EPA staffers are members of the local Air Quality Technical Plan Committee and Air Quality Review committees, which meet every 4-6 weeks (¶ 3). The local agency conducted a major field study and monitoring program partially financed by EPA (¶ 4). The local agency produced an interim air quality plan, which was reviewed and evaluated by EPA. (¶ 5). EPA met with and discussed its Advanced Notice of Proposed Rulemaking for a FIP with local officials (¶ 6). Finally, EPA joined the State Air Resources Board in evaluating local planning efforts. The agency noted that "For purposes of the FIP, the District's planning functions are most important."

This recitation shows that the Government is being entirely disingenuous when it disputes that a FIP would do no more than "fill gaps in areas in which the State had failed to satisfy fully its obligations under the Act." (Petition in the *Coalition* case, p. 13.) The fact is that EPA's FIP efforts in Sacramento have been closely coordinated with local activities; there has been no duplication or conflict. Indeed, the two jurisdictions' activities have complemented each other. In short, the State is not precluded from developing and ultimately putting into force revised SIP measures simply because EPA is also developing a FIP. Indeed, the adoption of a FIP has been and will continue to be a powerful spur to State and local authorities to produce a new SIP on time and in compliance with the law.

D. EPA has its priorities backwards. The Government worries about problems the "regulated community" might have with a FIP. (*Coalition* petition, p. 25). Instead, it **should** be concerned with the needs of the "breathing

community," which has suffered with unhealthy air in Sacramento for more than three decades. The overarching intent of the Clean Air Act since its beginning was to achieve the ambient standards as soon as possible. That concern was not changed by the 1990 amendments. This Court should not yield to the Government's invitation to rewrite the law in favor of dirty air.

CONCLUSION

For the reasons stated, EPA's petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH J. BRECHER
1970 Broadway, 12th Floor
Oakland, CA 94612
(510) 272-0433
Counsel for Respondents

December 8, 1992

Appendix A – List of Potential FIP Control Measures

This ANPRM is intended to provide the public with a list of possible control measures that may be promulgated in a federal implementation plan for the Sacramento AQMA. The list includes every possible control measure that EPA could identify which may reduce emissions in the Sacramento area. The publication of this list, however, does not commit EPA to the proposal or promulgation of any or all of these measures.

By listing a measure, EPA is not claiming that the measure would, if promulgated, improve air quality in the Sacramento AQMA nor is EPA claiming that any of these measures are reasonably available control measures within the meaning of section 172(b)(2) or (3) of the CAA. EPA must carefully evaluate each possible potential control measure before considering any measure for inclusion in a FIP.

On-Road Motor Vehicles

On-road motor vehicles include passenger cars; light, medium, and heavy-duty trucks; buses; and motorcycles. In the Sacramento AQMA on-road motor vehicles are estimated to contribute 55.8 tons per day[1] (t/d) of

---

[1] All inventory numbers are taken from the *Interim Regional Air Quality Plan*, Committee Review Draft (SACOG, September 1989) p. 76, and represent projections off a 1985 baseyear inventory. The inventories in the *Interim Plan* are draft and are subject to change.

reactive organic gases (ROG)[2] and 80.4 t/d of nitrogen oxides (NOx) in 1990 or 39.7 percent of the total ROG inventory and 67.6 percent of the total NOx inventory. While on-road motor vehicles are the largest source of VOC emissions in 1990, their contribution to the overall VOC inventory declines significantly in the future because of continuing reductions from already-adopted vehicle emission standards and from California's Smog Check program. However, on-road motor vehicles are now and will continue to be the largest source of NOx emissions.

There are two ways of reducing emissions from on-road motor vehicles. The first way, referred to as "mobile source control measures," is to reduce the rate at which motor vehicles emit pollutants through vehicle emission standards, inspection and maintenance programs (Smog Check), and the use of clean fuels. The second way, referred to as "transportation control measures," is to reduce the number of trips and/or miles driven by motor vehicles, change the time of day when trips are taken, or increase vehicle speeds by reducing congestion or improving traffic flow.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from on-road motor vehicles include the following.

---

[2] In this notice, the terms "reactive organic gases (ROG)" and "volatile organic compounds (VOC)" are used interchangeably.

Mobile Source Control Measures

1. Lower and/or in-use emission standards for light duty passenger vehicles, all weight ranges of trucks, and buses; emission standards for motorcycles.

2. Greater control of evaporative emissions from gasoline-powered vehicles.

3. Lower Reid Vapor Pressure (RVP) limits on gasoline sold during the ozone season; diesel fuel quality standards to reduce NOx emissions; gasoline fuel quality standards to prolong the life of on-board vehicle emission control systems.

4. Minimum sales level of low-emitting (e.g., methanol) motor vehicles or extremely low-emitting (e.g., electric) motor vehicles; required purchase by vehicle fleet operators of clean-fueled vehicles; the manufacture, distribution, and sale of clean motor vehicle fuels.

5. Enhancements to the current inspection and maintenance program (e.g., requiring annual inspections, reducing or eliminating waivers, expanding the geographical boundaries of the program); the identification and repair of "smoking" vehicles.

6. Requirements for the sale and use of oxygenated fuels (e.g., gasohol) during the ozone season.

Transportation Control Measures

1. Regulations for employer-based trip reduction programs which may include requirements for alternative work-hours, transit-use incentives, telecommuting and

teleconferencing, car/vanpool matching and/or subsidies, preferential parking for car/vanpools, and on-site services; extension of current local trip reduction regulations to multi-tenant employer complexes

2. Requirements that new facilities with over a threshold number of parking spaces receive a permit of approval based on air quality considerations prior to construction (management of parking supply).[3]

3. Regulations to reduce off-peak trips such as requiring merchants to offer customers alternative mode facilities and incentives and programs to increase the use of at-home shopping and banking services.

4. Conformity procedures under CAA section 176(c) that require detailed analysis of the air quality impacts of federally funded, approved, permitted, and/or licensed activities and require mitigation of or prohibit federal activities that have adverse air quality impacts, especially those activities that increase job/housing imbalances.

5. Use of the transportation funding priority requirement in CAA section 176(d) to advance air quality-beneficial transportation projects such as transit improvements, traffic flow improvements, nonrecurrent (accident-response) congestion relief programs, high-occupancy

---

[3] Parking pricing has been shown to be an effective method of reducing the number of vehicle trips; however, EPA is prohibited from imposing parking surcharges in FIPs by section 110(c)(2)(B) of the CAA. This prohibition does not extend to state or local agencies adopting, and EPA approving, such programs as part of SIPs.

vehicle lanes, park and ride lots, and reduction of at-grade rail crossings.

6. Review and mitigation program for federally-assisted or owned indirect sources.[4]

7. Requirements for special event centers (e.g., stadiums, arenas, large concert halls) to develop programs that reduce trips to events at their centers.

8. Restrictions on truck traffic during peak traffic periods; requirements for off-peak delivery and shipping.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from on-road motor vehicles include the following.

1. Limits on vehicle registration which may include prohibiting the registration of older, higher-polluting vehicles.

2. Mandatory no-drive days.

3. Restrictions on the sale of motor vehicle fuels.

Organic Solvents

Organic solvents are hydrocarbon-based liquids that are used in the manufacture of or are contained in almost every product made. They are found in paints and inks; pesticides; and consumer products such as deodorants, auto care products, and household care products. They

---

[4] EPA is prohibited from promulgating in FIPs an indirect source review program for non-federal facilities by section 110(a)(5)(A)(ii) of the CAA. A state or local agency may adopt, and EPA may approve, such a program as part of a SIP.

are also used in a wide variety of industries to clean (degrease), prime, and coat surfaces. In the Sacramento AQMA, emissions from solvent evaporation are estimated to be 51.0 t/d of ROG in 1990 or 36.3 percent of the total ROG inventory; solvent usage does not emit NOx. In the Sacramento AQMA, as throughout California, organic solvents are expected in the future to become the largest single emission source category of VOC.

Regulatory Measures: Potential techniques for the control of VOC from organic solvents include the following.

1. Reformulation to lower VOC content of solvents, coatings, primers, and clean-up solvents.

2. Substitution of less- or non-photochemically reactive compounds in solvents, coatings, primers, and/or clean-up solvents.

3. Specification of a maximum daily VOC emission rate from a source.

4. Specification of minimum transfer efficiency in coating operations.

5. Specification of the equipment used to apply surface coatings.

6. Controls on previously exempt coatings, solvents, and sources.

7. Add-on controls (afterburners or carbon adsorption).

8. Workpractice and recordkeeping rules.

9. Solvent disposal rules.

Source categories in the Sacramento AQMA that could potentially be subject to the new or additional FIP

regulatory controls are listed below. The specific techniques to be applied to a source category depend on the type and use of solvent to be controlled and, therefore, will vary among categories.

1. Can coating.
2. Road paving operations.
3. Degreasing operations.
4. Graphic arts (printing).
5. Aerospace manufacturing.
6. Fiberglass-reinforced plastics manufacturing.
7. Auto and truck refinishing.
8. Plastic, rubber, and glass coating operations.
9. Paper, film, and fabrics coating operations.
10. Semiconductor manufacturing.
11. Pesticide application.
12. Dry cleaning.
13. Pharmaceutical manufacturing.
14. Rigid and flexible computer disk manufacturing.
15. Metal parts cleaning and coating operations.

Products used in the Sacramento AQMA that could potentially be subject to reformulation, maximum VOC content limit, and/or substitution under FIP regulations include the following.

1. Asphalt paving materials.

2. Degreasing solvents.

3. Inks.

4. Architectural coatings.

5. Aerospace coatings.

6. Primers and clean-up solvents used in all coating operations.

7. Fiberglass resins.

8. Automobile and truck paints.

9. Adhesives.

10. Dry cleaning solvents.

11. Paper, film, and fabric coatings.

12. Consumer products such as personal care products (e.g., colognes, deodorants, and hair care products), household products (e.g., room deodorants, furniture polishes, and laundry products), lawn and garden pesticides, and automotive and industrial products (e.g., refrigerants, lubricants, and engine degreasers).

13. Agricultural and commercial pesticides, herbicides, and fungicides.

14. Marine coatings.

15. Building construction materials.

16. Barbecue lighter fluid.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC from organic solvents include the following.

1. Restrictions or prohibitions or on the manufacture, sale, and/or use of any solvent, pesticide, consumer solvent, and/or coating with a VOC content or a vapor pressure greater than a given limit.

2. Restrictions on the total sales/use of solvents, pesticides, consumer products, or coatings to a given level during a given time period.

Off-Road Mobile Sources

Off-road mobile sources include off-road motorcycles, recreational and commercial boats, trains, airplanes, farm equipment, construction equipment, home and commercial lawn care equipment, and other small utility equipment. In the Sacramento AQMA, these types of sources are estimated to emit 18.9 t/d of ROG and 24.5 t/d of NOx or 13.4 percent of the total 1990 ROG inventory and 20.6 percent of the total NOx inventory

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from off-road mobile sources include the following.

1. Electrification of utility equipment, locomotives, ships at berth, pleasure boat motors, and ground equipment at airports.

2. Use of clean fuels in utility equipment, locomotives, construction equipment, farm equipment, ground equipment at airports, and pleasure boat motors.

3. Emission standards for utility equipment, locomotives, new and reconditioned construction equipment, farm equipment, off-road motorcycles, and pleasure boat motors.

4. Airport operation programs that reduce aircraft taxiing and idling, require centralized power supply for aircraft at gates, and/or prohibit landing/take-off of non-Stage III aircraft.

5. Use of vapor recovery equipment during marine vessel loading, ballasting, and housekeeping.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from off-road mobile sources include the following.

1. Restrictions on the use of utility equipment, locomotives, motorized pleasure boats, and construction and farm equipment during the ozone season.

2. Restrictions on take-offs and/or landings of commercial and general aviation planes during the ozone season.

3. Restrictions on the docking, loading, and operation of marine vessels during the ozone season.

Petroleum Extraction and Marketing

This category includes emissions from oil and gas extraction in Yolo and Solano Counties and mobile source fuels distribution. Also included here and not in the fuel combustion category are emissions from fuel combustion during petroleum extraction. Emissions from petroleum extraction and marketing in the Sacramento AQMA are estimated to be 8.7 t/d of ROG and 2.1 t/d of NOx in 1990 or 6.2 percent of the total ROG inventory and 1.8 percent of the total NOx inventory.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from petroleum extraction and marketing include the following.

1. Controls on oil production wells and other oil field equipment such as internal combustion engines, tanks, sumps, and pits; controls on leaks from valves, flanges, pumps, and compressors.

2. More stringent controls on tanks used for the storage of petroleum products.

3. Elimination of exemptions based on throughput and tank size in existing local rules for vapor recovery equipment at bulk gasoline distributors.

4. "Fail-safe" Stage I (underground storage tanks) vapor recovery at service stations; certification of installation and maintenance contractors of Stage II vapor recovery equipment (gasoline pump nozzles).

5. Vapor recovery controls during marine bunkering and lightering.

6. Vapor recovery equipment for pleasure boat fueling.

7. Vapor recovery equipment at airport transfer points of aviation fuel.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from petroleum extraction and marketing include the following.

1. Restrictions or prohibitions on the storage of petroleum products during the ozone season.

2. Restrictions or prohibitions on the extraction of petroleum during the ozone season.

3. Restrictions or prohibitions on the transfering, transportation, and/or dispensing of any petroleum product

including any motor vehicle fuels or aviation fuel during the ozone season.

Stationary Point and Area Sources

This category includes emissions from processes at point sources and area sources which are not included in the emission categories discussed previously. Sources in this category include chemical manufacturing, food and agricultural processing, waste handling and disposal, and wood and paper manufacturing. Emissions from these sources in the Sacramento AQMA are estimated to be 5.3 t/d of ROG and 0.3 t/d of NOx in 1990 or 5.3 percent of the total ROG inventory and 0.3 percent of the total NOx inventory.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from stationary point and area sources include the following.

1. Control of VOC emission releases to the atmosphere from airstripping, wastewater treatment plants, and soil decontamination.

2. Collection and recovery or destruction of landfill gases.

3. Add-on controls (carbon adsorption) to reduce emissions from fermentation at wineries and breweries.

4. Add-on controls on commercial charbroiling operations.

5. Add-on controls (afterburners) to reduce emissions from bread ovens at large commercial bakeries.

6. Controls on paper manufacturing.

7. More stringent control of fugitive emissions chemical plants.

The following regulatory measures potentially apply to all stationary point sources and most discrete area sources in this category as well as in the organic solvent; petroleum extraction and marketing; and fuel combustion categories.

1. More stringent levels of best available control technology (BACT) and lower emission thresholds for application of BACT.

2. Application of best available retrofit control technology (BARCT) on all existing sources.

3. Lowering or elimination of the emission thresholds (VOC and NOx) at which new sources or modifications to existing sources become subject to new source review and offset requirements; increased offset ratios for new and modified sources.

4. Elimination of the use of existing banked credits and prohibition on future banking of credits for source shutdowns, controls, or production curtailment.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from stationary point and area sources include the following.

1. Restriction on or prohibition of controlled burning (e.g., agricultural) during the ozone season.

2. Restriction on or prohibition of the operation of charbroilers and bakeries during the ozone season.

The following FIP prohibitory measures potentially apply to all stationary point sources and most discrete

area sources in this category as well as in the organic solvent; petroleum extraction and marketing; and fuel combustion categories.

1. Allowing no net growth in emissions by restricting or prohibiting the construction and/or modification of any source within the non-attainment area for which emissions are not fully off-set.

2. Shut-down of or curtailment of production at stationary pollution sources during the ozone season.

3. A cap on annual growth of VOC and NOx emissions from all sources to a pre-determined level.

Fuel Combustion

Fuel combustion sources include both VOC and NOx emissions emitted during the burning of fossil fuels in a wide variety of activities from industrial to agricultural and residential. Emission sources include stationary internal combustion (I/C) engines (pumps, compressors, small generators), boilers, water heaters, and steam generators. Emissions from fuel combustion in the Sacramento AQMA are estimated to be 0.9 t/d of ROG and 11.7 t/d of NOx in 1990 or 0.6 percent of the total ROG inventory and 9.8 percent of the total NOx inventory. Because of the importance of these sources to NOx emissions, fuel combustion controls are primarily NOx controls.

Regulatory Measures: Potential FIP regulatory measures to control NOx from fuel combustion include the following.

1. Emission standards for, or modifications to, new natural gas residential water heaters.

2. Emission standards or flue-gas controls, use of alternative fuels, burner modifications, and/or operating controls for industrial, institutional, and commercial boilers, steam generators, incinerators, and process heaters.

3. Emission standards for stationary I/C engines; electrification of, use of clean fuels in, flue-gas controls, or engine modifications on such engines.

4. Combustion treatment of exhaust streams, clean fuel use in, or combustion system modifications for afterburners.

5. Substitution of clean fuels (e.g., natural gas, methanol) for current uses of fuel oils/solid fossil fuels in all stationary source fuel combustion processes.

Prohibitory Measures: A potential FIP prohibitory measure to control NOx from fuel combustion is the following.

1. Restrictions or prohibitions on the use of certain higher-polluting stationary source fuels (e.g., fuel oils) during the ozone season.

APPENDIX B

DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE BLATNIK
United States Department of Justice
Land & Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2617

DAVID LEVI
United States Attorney
MARY L. GRAD
Assistant United States Attorney
650 Capitol Mall, Room 3305
Sacramento, California 95814
(916) 551-2752

LUCIA L. BLAKESLEE
Assistant Regional Counsel
United States Environmental Protection Agency, Region 9

Attorneys for Defendant United States
Environmental Protection Agency

JOSEPH J. BRECHER
Attorney at Law
506 – 15th Street
Oakland, California 94612
(415) 763-3594

KATHRYN BURKETT DICKSON
295 Fell Street, Suite A
San Francisco, California 94102
(415) 864-1725

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., and SIERRA CLUB, Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF TRANSPORTATION; CITY OF SACRAMENTO; COUNTY OF SACRAMENTO; SACRAMENTO AREA COUNCIL OF GOVERNMENTS, Defendants.	Case No. CIVS-87-0420 EJG STIPULATION AND ORDER OF SETTLEMENT (Filed Apr. 18, 1989)

Plaintiffs, Environmental Council of Sacramento and the Sierra Club, and Defendant, United States Environmental Protection Agency ("EPA"), through their respective counsel, hereby stipulate and agree as follows:

1. In March 1987, plaintiffs filed a Complaint in this action in the Eastern District of California under the Clean Air Act ("the Act"), 42 U.S.C. § 7604, against the EPA, the United States Department of Transportation, various local governmental agencies and various private parties. An Amended Complaint was filed on June 6, 1988 (hereinafter referred to as the "Complaint"). By their Complaint, plaintiffs sought to halt, reduce or ensure adequate mitigation for a proposed development in the North Natomas area of Sacramento. In addition, plaintiffs

alleged that EPA failed in its mandatory duty to disapprove the Sacramento State Implementation Plan ("SIP") for ozone and to promulgate a Federal Implementation Plan ("FIP") for attainment of the primary National Ambient Air Quality Standard ("NAAQS") in the Sacramento area.

2. Subsequently, plaintiffs entered into a settlement agreement with many of the defendants. EPA was not a party to those settlement negotiations. On August 8, 1988, the Court entered an Order of Partial Dismissal, dismissing claims against various defendants, not including the EPA.

3. On December 1, 1988, pursuant to an agreement with plaintiffs, EPA published final disapproval of the 1982 Sacramento Air Quality Management Plan ("AQMP") for attainment of the primary national ozone standard.

4. The final remaining issue between plaintiffs and EPA is the Third Claim for Relief in the Complaint which alleges that EPA has a non-discretionary duty to promulgate a FIP for the Sacramento area and seeks an order of the Court to direct EPA to promulgate a FIP for ozone in the Sacramento area.

5. The parties wish to effect a settlement of plaintiffs' Third Claim for Relief without expensive and protracted litigation and therefore have agreed to enter into this Stipulation. Nothing contained herein shall be construed as an admission by EPA that it has a duty otherwise to undertake any obligation agreed to herein.

6. Section 110(c)(1) of the Act provides that the Administrator of EPA shall prepare "an implementation plan, or portion thereof" for any State which fails to prepare and implement a SIP to achieve reasonable progress toward attainment of the NAAQS. Based on its December 1, 1988 disapproval of the 1982 Sacramento AQMP and pursuant to Section 110, EPA agrees to undertake the promulgation of FIP for the attainment and maintenance of the primary NAAQS for ozone for the Sacramento area according to the schedule described herein except to the extent that, prior to the date(s) on that schedule, EPA approves a State-submitted implementation plan for attainment of the primary ozone NAAQS for the Sacramento area.

The parties acknowledge that the primary responsibility for developing a comprehensive revision of the SIP lies with the Sacramento Area Council of Governments ("SACOG") and other responsible local and regional agencies. The parties also agree that the purpose of the measures to be promulgated by EPA pursuant to Section 110, as specified in Paragraph 8 herein, is to develop additional control measures as needed to create an approvable plan. EPA agrees that any plan or measures promulgated by EPA under the authority of Section 110, pursuant to Paragraph 8 herein, shall supplement, and hence keep in effect, the approved provisions of the present SIP and any additional provisions submitted by the State that EPA approves into the SIP before EPA takes final action to promulgate the plan under Section 110.

7. The parties jointly agree to request the Court to stay these proceedings until January 1, 1992 to permit EPA to develop and promulgate a FIP for attainment of

the primary NAAQS for ozone for the Sacramento area according to the schedule set forth below at Paragraph 8.

8. In the event the Court enters the Order which is part of this Stipulation, and subject to legal and equitable considerations that both parties or the Court may ultimately determine applicable, EPA shall, unless otherwise provided herein, take the following steps during the period of the stay:

a. Within three (3) months from the date of the entry of this Stipulation, EPA shall send plaintiffs a letter outlining EPA's workplan for the promulgation of the FIP;

b. Within six (6) months from the date of the entry of this Stipulation, EPA shall sign an Advance Notice of Proposed Rulemaking ("ANPRM") and shall subsequently publish this ANPRM in the Federal Register. The ANPRM, which shall solicit public comment, shall include, among other things:

i. a list of possible control measures that might be included in a FIP for the Sacramento area; and

ii. the criteria by which EPA will determine whether the local planning agencies are making the "reasonable efforts" toward the submission of an approvable SIP which are necessary to avoid the imposition of discretionary sanctions under Section 176(a) and (b).

c. In the event that the California Air Resources Board ("ARB") submits any SIP amendment for the Sacramento area to EPA during the period of this Stipulation,

EPA shall publish proposed approval of those amendments that EPA determines are approvable within three (3) months of its submittal, and shall take final action on such amendments within four (4) months from the published proposal;

d. Within twenty (20) months of the entry of this Stipulation, EPA shall make a preliminary decision whether the State has submitted an approvable SIP or whether it will be necessary to promulgate a FIP for the Sacramento area;

e. Within twenty-four (24) months of the entry of this Stipulation, the Administrator of EPA shall sign a Notice of Proposed Rulemaking ("NPRM") to be published in the Federal Register that sets forth either the proposed SIP or EPA's proposed FIP to attain the primary ozone NAAQS in the Sacramento area; and

f. Within thirty-two (32) months of the entry of this Stipulation, the Administrator of EPA shall sign a Notice of Final Rulemaking ("NFRM") to be published in the Federal Register that sets forth either EPA's approval of the final SIP or EPA's final FIP to attain the primary ozone NAAQS in the Sacramento area.

9. EPA shall confer, either in person or by telephone, at a mutually agreed upon time and place, with plaintiffs every four months during the period of the stay for the purpose of providing plaintiffs with information on the progress of the SIP/FIP development. EPA may, at its option, open these meetings to the general public or other governmental agencies.

10. The parties jointly agree to report to the Court the status of EPA's progress in undertaking the tasks described in Paragraph 8 above every six months after entry of the Order imposing the stay of proceedings referred to in Paragraph 7.

11. Plaintiffs may move the Court to vacate the stay of the proceedings referred to in Paragraph 7 and reactivate the litigation if:

a. EPA has substantially failed to carry out the tasks described in Paragraph 8; and

b. Plaintiffs have contacted EPA at least four (4) weeks before filing such motion to discuss the grounds for such motion and to attempt to resolve any disagreement between the parties without recourse to the Court.

12. By this Stipulation, plaintiffs do not waive any claims they have or may have against EPA, and EPA does not waive any defenses it has or may have against any to the claims advanced by plaintiffs.

13. This Stipulation may be modified at any time during the period of the stay by consent of the parties or upon motion to the Court by either party on a showing of good cause.

14. In the event that legislation enacted by the United States Congress during the period of the stay affects EPA's or the State's obligations under the Clean Air Act with respect to the final rulemaking on a SIP or FIP for the Sacramento area, EPA reserves the right to move the Court for an order vacating this Stipulation in its entirety and relieving EPA of any and all obligations under the Stipulation and Order.

15. Within thirty days after the promulgation of a Plan as set forth in Paragraph 8(f) above, plaintiffs shall file with the Court a motion to dismiss or withdraw the Complaint with prejudice. If plaintiffs fail to do so, EPA may file such a motion and plaintiffs shall not oppose dismissal with prejudice.

16. After the lodging of this Stipulation, parties to this litigation, other than the parties signing this Stipulation, shall have thirty days to comment on this Stipulation prior to its being entered.

17. Nothing in the terms of this Stipulation shall be construed to confer on the Court jurisdiction to review the substance of any decision to be made by the Administrator of EPA with respect to the approval of a SIP or the promulgation of a FIP for the Sacramento area.

WHEREFORE, the parties have executed this Stipulation and Order of Partial Settlement by their duly authorized counsel or legal representatives:

For defendant United States Environmental Protection Agency:

DONALD A. CARR
Acting Assistant Attorney General

Dated: 4/12/89

/s/ Lawrence Blatnik
LAWRENCE BLATNIK
U.S. Department of Justice
Land & Natural Resources Division
Environmental Defense Section

DAVID LEVI
United States Attorney

Dated: 4/14/89 /s/ Mary L. Grad
MARY L. GRAD
Assistant United States Attorney

Dated: 4/11/89 /s/ Lucia L. Blakeslee
LUCIA L. BLAKESLEE
Assistant Regional Counsel
U.S. Environmental Protection Agency

For plaintiffs Environmental Council of Sacramento and Sierra Club:

Dated: 4/4/89 /s/ Joseph J. Brecher
JOSEPH J. BRECHER

Dated: 4/5/89 /s/ Kathryn Burkett Dickson
KATHRYN BURKETT DICKSON

APPENDIX C

RICHARD B. STEWART
Assistant Attorney General
MICHAEL D. ROWE
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3144

DAVID LEVI
United States Attorney
MARY L. GRAD
Assistant United States Attorney
650 Capitol Mall, Room 3305
Sacramento, California 95814
(916) 551-2752

Attorneys for the United States
Environmental Protection Agency

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., and SIERRA CLUB, Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	No. CIVS-87-0420-EJG STATUS REPORT (Filed Jun 26, 1990)

On June 26, 1989, this court entered an Order, pursuant to Stipulation of Settlement by the parties, staying this proceeding until January 1, 1992. During that period, defendant Environmental Protection Agency ("EPA") has agreed to prepare, propose and promulgate a federal implementation plan ("FIP") for the attainment and maintenance of the primary National Ambient Air Quality Standard ("NAAQS") for ozone for the Sacramento area. EPA will develop and promulgate the FIP according to a schedule set forth in the parties' Stipulation of Settlement (the "Stipulation"). In compliance with the Court's June 26, 1989 Order, EPA hereby submits the following report on the status of its activities:

1. Weekly conference calls among EPA personnel working on FIP development for various locales in Region 9 have continued through this six month period. The calls typically are one hour in length and are devoted to coordinating FIP development activities and reaching decisions on critical FIP issues.

2. Region IX staff working on the Sacramento FIP continue to evaluate work products from EPA contracts awarded to assist in the development of the South Coast and Ventura FIPs to determine applicability in developing the Sacramento FIP. The contracts for the South Coast FIP are nearing completion in order to support the Notice of Proposed Rulemaking which must be signed, pursuant to court order, by the Administrator no later than July 31, 1990. The South Coast FIP is currently scheduled to be finalized, and the Ventura FIP proposed, before the Sacramento FIP is proposed. It is Region IX's intention to utilize applicable measures from these areas in the Sacramento FIP.

3. Since May, 1987, the Sacramento Area Council of Governments ("SACOG") has been coordinating efforts to update the 1982 Sacramento Air Quality Plan for the Sacramento Air Quality Maintenance Area ("AQMA"). As part of the update process, three advisory committees were formed to provide guidance and advice on the work being performed. EPA, Region IX staff are voting members on two of these advisory committees: the Air Quality Plan Technical committee ("AQPTC") and the Air Quality Technical Review committee ("AQTRC") for modeling. In addition to Region IX staff, the AQPTC is comprised of representative from SACOG, the cities and counties within the Sacramento AQMA, the Cleaner Air Partnership of Sacramento, and Air Pollution Control Districts within the Sacramento AQMA. In addition to Region IX staff, the AQTRC for modeling is comprised of representatives from SACOG, Air Pollution Control Districts within the Sacramento AQMA, and the California Air Resources Board. Both the AQPTC and the AQTRC meet every 4 to 6 weeks. Region IX staff continue to attend these meetings regularly.

4. Under the leadership of SACOG, a major field study and monitoring effort was conducted last summer. Information collected during this study was to be used to support air quality modeling for Sacramento. However, unusual weather in the Sacramento area made it impossible to gather the necessary meteorological and emissions data to run the model. During January and February of 1990, the AQTRC for modeling met to analyze the available options and decided to repeat the field study this summer. Contracts are now underway to carry out this summer's study, and equipment is being located in the

field. Intensive monitoring will commence in July and will continue through August, 1990. EPA staff is overseeing this work through the AQTRC.

EPA intends to award $640,000 in FY-90 federal grant funds to Sacramento agencies toward these monitoring and modeling efforts. These funds will be passed through the Sacramento Metropolitan Air Quality Maintenance District ("SMAQMD") to SACOG. SACOG will, in turn, contract with Systems Applications Incorporated and Sonoma Research.

5. In January of 1990, SACOG produced a final "Interim Regional Air Quality Plan." This Interim Plan provides a new emissions inventory through the year 2010, evaluates various emission control strategies, ranks control strategies in terms of relative effectiveness, and sets forth a process to obtain public input as well as to obtain commitments by cities and counties in the AQMA to adopt various emission control measures. SACOG is now in the process of obtaining these commitments from the Sacramento area jurisdictions. Region IX staff continues to review and evaluate the Interim Plan through the AQPTC.

6. On March 1, 1990, the Regional Administrator signed an Advanced Notice of Proposed Rulemaking ("ANPRM") for the Sacramento area. The ANPRM was subsequently published on April 5, 1990 (55 FR 12669). The ANPRM contains two parts. The first part is a list of possible control measures that might be included in a FIP for the Sacramento area. The second part is a set of criteria by which EPA will determine whether the Sacramento area and the State are making reasonable efforts to

submit an adequate air quality plan. The publication of the ANPRM satisfies EPA's obligations pursuant to paragraph 8.b of the Stipulation.

Prior to the signing of the ANPRM, Region 9 developed a communication strategy to prepare the State and Sacramento local agencies for EPA's action. On February 27, 1990, EPA staff met with State and local agencies staff to discuss the ANPRM.

EPA solicited public comment on both parts of the ANPRM. The comment period closed on June 4, 1990. Region IX is now monitoring the State and local agencies' activities in light of the reasonable efforts criteria.

7. On April 20, 1990, EPA staff conferred via telephone with representatives of plaintiffs to discuss the progress of SIP/FIP development. This conference call was conducted to satisfy EPA's obligations under paragraph 9 of the Stipulation. The discussion focused on plaintiffs' comments and questions on the ANPRM.

8. Region IX joined the California Air Resources Board ("CARB") in conducting a comprehensive program evaluation of the SMAQMD. EPA and CARB reviewed many of the SMAQMD's programs including new source review, asbestos, compliance, monitoring, rule development, and planning. For purposes of the FIP, the District's planning functions are most important. The planning portion of the evaluation was conducted during April, 1990 through more than sixteen interviews with planning staff and managers at the SMAQMD, SACOG, the City of Sacramento, the County of Sacramento, and the Cleaner Air Partnership of Sacramento. EPA and the CARB are

now in the process of drafting program evaluation findings and recommendations.